VOL. I. **PART III.**

THE JAMMU & KASHMIR LAW REPORTS.

SAMVAT 1999

HAR

(JUNE-JULY, 1942)

[PAGES 79-117]

CONTAINING

CASES DETERMINED BY THE HIGH COURT OF JUDICATURE, JAMMU & KASHMIR, AND BY HIS HIGHNESS' BOARD OF JUDICIAL ADVISERS.

CITATION:—I, J. & K. L. R. 56 etc.

EDITED BY

BADRI NATH, B. A., LL. B.

Printed by the Superintendent, the Ranbir Government Press, Jammu and published at the Government Book Depot, under the authority of His Highness' Government, Jammu and Kashmir.

Annual Subscription Rupees Six.

TABLE OF CASES REPORTED.

This was a statutory duty cast upon them and their failure to discharge it will not entitle them to demand increased rate now.

The only other question that argued was that the Court has acted erroneously in not allowing compound rate of interest which was stipulated in the mortgage deeds. The learned trial Court has given very good reasons for not allowing interest at the compound rate. It says, in the first place, that it is penal clause and we ageee that in the circumstances this clause must be taken to be a penal clause. It must be borne in mind that the mortgages were intended to be possessory mortgages and it was up to the plaintiffs to take possession of the property and to retain it. Their failure to take possession of the property forthwith and to retain it should not entitle them to demand compound interest. The plaintiffs have not been able to show that they were forcibly dispossessed and it does not appear why they acquiesced in losing possession of the property. If they could not retain possession of the propety they have only themselves to thank for it.

In the result it would appear that there is no force in the grounds pressed on behalf of the plaintiffs and that judgment of the trial Court is absolutely correct.

It should be stated here that the defendant's version with regard to possession has been dealt with at length in the course of this judgment. It is on this question that his cross objections were mainly pressed. We have indicated that his version of the case is not only incorrect but dishonest and is not supported by any reliable evidence. Besides his conduct in the course of the trial, as remarked by the learned trial Court, has been so evasive, unhelpful and reprehensible that he does not deserve any sympathy.

For the reasons adumbrated above we dismiss this first appeal but in the circumstances of the case we leave the parties to bear their own costs.

Appellate Civil.

Before Chief Justice (R. B. Thakur Rachhpal Singh
and
Mr. Justice Masud Hasan.

MST. DURGA DEVI (PLAINTIFF)—APPELLANT.

versus

CHAIN SINGH AND OTHERS (DEFENDANTS)—RESPONDENTS.

CIVIL FIRST APPEAL NO. 75 OF 1997.

1998 *Civil Procedure Code—Order XIV—Settlement of issues—duty of Court before framing issues.*

Magh 25 *It is the duty of the Court, before the trial commences, to clear the pleadings of the parties and find out what their allegations are in respect of a particular matter. If the pleadings are not quite clear then the Court should find out by examining the parties what their case is. Where the case of the defendant was that the document had been executed under undue influence it was necessary for the Court to ascertain the nature of undue influence alleged and bring it in issue specifically.*

Joint Hindu family—presumption as to property in possession of joint Hindu family.

The property in possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown even though it may have been acquired in the name of a particular member of the family. The fact that the property stands in the name of one or other member of a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member, I. L. R. 35 Allahabad 564, 29 Allahabad 244 followed.

One member of a joint Hindu family describing the property comprised in the will as his self-acquired property—it is of no value.

The deceased testator described the house comprised in the will as his self-acquired property. This is merely a statement by the deceased who was one of the members of the joint Hindu family. Other members of the joint family can insist that the fact should be proved by those relying upon the will.

One member of joint family in possession of the property—no presumption about its being self-acquired.

There can be no presumption that the house was the self-acquired property of one member of a joint Hindu family simply because he was in possession of it for several years. The plaintiff has in the first instance to prove that the deceased was not a member of the joint family.

APPEAL FROM THE DECISION OF SUB-JUDGE, KATHUA, (L. MULK RAJ GAIND) DATED 27TH HAR 1997.

MR. DINA NATH—Advocate for the Appellant.
MR. ANANT RAM Oswal—Advocate for the Respondents.

Per C. J.—This is an appeal by one Mst. Durga Devi against the decision of the Subordinate Judge of Kathua.

The facts are as follows :—

Mst. Durga Devi is the daughter of Mst. Santi alias Shani. It is said that Mst. Santi alias Shani was in the keeping of one Ludar Chand. On 18th of Har 1994 Ludar Chand, according to the allegation of the palintiff, executed a will under which he willed to her one house with some land situate in Kathua. After the death of Ludar Chand, which event took place in Magh 1995, the plaintiff came out with her suit. She alleged that after the death of Ludar Chand she gave the house to the defendants with permission to live there as she and her husband went away to Samba. After some time she returned to Kathua but the defendants refused to return the house and there-

fore she was compelled to institute a suit. Both the defendants Chain Singh and Hari Singh are real brothers. They are the sons of Ludar Chand. They denied the will set up by the plaintiff and further pleaded that even if its execution is proved it was not valid because it was not executed by Ludar Chand consciously. It was pleaded that it was the result of undue influence exercised by the plaintiff and therefore it was not valid. Then the defendants pleaded further that the house was not the property of Ludar Chand but was owned by the joint family. In other words, it was ancestral joint Hindu family property and the consent of other members was never obtained before executing the will. The learned Subordinate Judge has written a very lengthy judgment covering several pages. A perusal of the judgment shows that it was not at all necessary to write a lengthy judgment of this kind. The questions for decision were quite simple. The first point for consideration was whether the will had been executed by Ludar Chand. On that question several witnesses were examined by the plaintiff and some by the defendants. These witnesses agreed in proving that the will was executed. After hearing arguments of learned counsel on both sides we have not the slightest hesitation in holding that the execution of the will is duly proved and we think that it was not at all necessary for learned Subordinate Judge to devote several pages in considering the question whether this will was executed or not. In order to dispose of this important issue we may very briefly refer to the evidence of one witness of the plaintiff and one witness of the defendant. We refer to the evidence of Beli Ram who was examined by the plaintiff. He supports the plaintiff's case as regards the execution of the will. On the defendant's side we find that they examined among others one Ch. Dalip Singh. He deposed about the will. There are other witnesses examined on both sides whose evidence goes to establish the will but it is wholly unnecessary to refer to them at length because the point about the execution of the will is not disputed before us by anybody. We may, in passing, mention that the plaintiff examined Raghunath Das, Beli Ram, Amar Nath, and Bhagat Ram, as her witnesses to prove the execution of the will. The will is duly proved in our opinion and we proceed to consider other points in the case.

We will follow the example of the learned Subordinate Judge and deal with issue No. 5 first. Issue No. 5 runs as follows ;

> "Whether the will was executed under undue influence and if so what was the undue influence."

It may be remarked that the issue is not happily worded. One can easily understand the first part of the issue but it is difficult to understand what is the meaning of the second portion. The Court should have found out what the allegations of the defendants were as regards this matter and should not have framed this issue to the effect as to what the undue influence was. It is the duty of the Court, before the trial commences, to clear the pleadings of the parties and find out what their allegations are in respect of a particular matter. If the pleadings are not quite clear then the Court should find out by examining the parties as to what their case is. At one place the learned Subordinate Judge says "what that influence was appears on the surface of the whole case." We may say that we find it difficult to understand the meaning of this expression. There appears to be considerable confusion in the mind of the learned Subordinate Judge in understanding the meaning of the words "undue influence". It was alleged on behalf of the defendants that the mother of the plaintiff had illicit connection with Ludar Chand and this connection had gone so far that she began to live permanently with the latter and kept the plaintiff in her care. It is further said that she was a strong woman and the learned Subordinate Judge says that the case of the defendants was that she wielded great influence over Ludar Chand. Then the learned Subordinate Judge starts to consider the question as what is the definition of the word "undue influence" given in section 16 of the Contract Act. We have perused the judment of the learned Subordinate Judge and we find that he has not properly considered the question of undue influence. He starts in his judment refering to certain cases on the question of undue influence which have absolutely no bearing on the case before us. The learned Subordinate Judge in his judment at one place says "There is no evidence on the record to show that the legatee or her mother ever

asked Ludar Chand to execute this deed of will in favour of the plaintiff. It is not shown how the plaintiff or her mother were in a position to dominate the will of Ludar Chand. Unless this is proved section 16 Contract Act does not apply". Then he refers to A. I. R. 1932 P. C. 202. Then further on he continues to remark "At the most the defendants have proved this much that the plaintiff's mother once threw a *patila* on Ludar Chand and that she was rather of strong temperament. In my opinion these facts do not go to prove any undue influence..................On the other hand it is proved that Ludar Chand was very head strong.......................It is proved that the plaintiff or her mother were not present at the time when the deed was executed. So it cannot be safely presumed that there was any undue influence". "If out of regard for the woman he was keeping and for affection which Ludar Chand had with her daughter on account of long association it was not surprising incident that he willed away his one house to the daughter of the woman he had kept as a mistress for many years. He had chosen to call her a *Dharam* daughter, had married her and had cared for her from her childhood. No undue influence can be suspected to have been placed on the man devising a part of his property."

In another place the learned Subordinate Judge says:—

> "It has not been proved that he (Ludar Chand) was in such a mentally deranged condition that he could not understand any thing to his disadvantage. He died more than a year after the execution of the deed.......... I can firmly say that the deed has not been written under any influence whatsoever and that was the reason, perhaps, why defendant's counsel passed over this plea of his own. I decide this issue in the plaintiff's favour".

So far as this aspect of the case is concerned we need not labour over it because in the arguments addressed to us no attempt was made to show that the will was not executed, or that it was executed under undue

influence. Nor was it stated that the deceased did not intelligently execute the deed. We hold that the deed was executed and that no undue influence was exercised over the deceased Ludar Chand. We are further of opinion that it has not been proved that he did not intelligently execute the deed.

The more important question which was urged on behalf of the defendants before the Court below and which has been repeated here was that the property in suit was the joint family property and therefore Ludar Chand alone, who was a member of the joint family, was incompetent to dispose of that property by will. We proceed to consider this question. The following pedigree will show the relationship between the parties :—

Surjan Singh

Ludar Chand. Jodh Singh. Amar Singh.

Hari Singh Chain Singh.

The plaintiff, in para 1 of the plaint, asserted that the house was owned and was the self-acquired property of Ludar Chand deceased. On the other hand the defendants' case was that Surjan Singh and his sons and grand sons were joint owners of the property and therefore Ludar Chand alone had no power to dispose it of. Chain Singh defendant in his written statement pleaded that the property in suit was the joint family property and therefore his father Ludar Chand alone could not will it away. Hari Singh, his brother, in his written statement which is a lengthy one gives full details and pleads that the property belongs to the joint family. It was alleged that all the members of the family form a joint Hindu family with Surjan Singh as head of the family. He also pleaded that the house was acquired with the joint family funds in the time of Surjan and that Ludar Chand used to act as *mukhtar* of the whole joint family and that a *mukhtarnama* had been executed in his favour. It is here that we have a complaint to make against the Subordinate Judge

who framed the issues. If he had examined the parties carefully before recording the issues much trouble would have been saved. When the plaintiff stated that the house was the self-acquired property of Ludar Chand the Court should have asked the palintiff as to what is the meaning of her statement and how she says that the house was acquired by Ludar Chand. The house is an old one. Before we proceed to deal with the evidence produced in the case we wish to refer here to the legal aspect of the case. In Kundan Lal *versus* Shankar Lal reported in I. L. R. 35 Allahabad 564 it was held that a property in possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. The fact that property stands in the individual name of one or other member of a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member. This ruling goes dead against the palintiff. We may refer to the ruling of Lal Bhadur and others *versus* Kanhaiya Lal on the same question which is an important pronouncement by their Lordships of the Privy Council. The case is reported in 29 Allahabad 244. Their Lordships of the Privy Council in this case remarked that there being a nucleus of ancestral property the onus was on the defendant to show that the property in suit was self-acquired and not purchased with ancestral funds; that such onus had not been discahrged in that case which was before their Lordships. In the present case we have absolutely no doubt, having regard to these authorative pronouncements, that it was for the plaintiff to prove that the property in suit was the self acquired property of Ludar Chand. We entirely agree with the learned Subordinate Judge in holding that the plaintiff has failed to prove this point. It appears to us that the view taken by the learned Subordinate Judge about the house being the ancestral property is correct. The plaintiff, herself, was not, by any evidence, able to prove the house to be the self-acquired property of Ludar Chand. The learned Subordinate Judge has found that the evidence of the defendants goes to prove clearly that the house was built partly in the life time of

Surjan Singh and partly after his death. This finding is correct. Learned counsel appearing for the plaintiff appellant has argued that at the time of Surjan the house was *kacha* and Ludar Chand made it later on *pakka* and spent money on it. This may be but the evidence does not prove the fact. As the house was built in the time of Surjan the presumption is that it was the joint family property of Surjan and his sons. The evidence in the case proves that Surjan was a *lambardar*. The learned Subordinate Judge has found that his income was Rs. 1,000 a year. This is proved from the statement of Bhagat Ram and Mohan Lal Patwari. Surjan was recorded as owner of 1328 kanals of land in one khewat and 123 kanals and 1 marla in the other khewat. All this goes to prove that the family was doing well and there was a nucleus with the aid of which property could have been purchased. The defendants had only to show that there was nucelus and when that is established the presumption that the property was ancestral is strengthened. We have considered the evidence produced on both sides and it is our opinion that on this evidence the learned Subordinate Judge could not come to the conclusion that the house was the separate and exclusive property of Ludar Chand. It was never the case of the plaintiff that Ludar Chand had become separate by partition from other members of the family at any time. There is not a word about partition in any statement made on the side of the plaintiff. As the family was doing well the learned Subordinate Judge was right in making a presumption that the house was built with the family funds. Of course, it was open to the plaintiff to show that the house was not built with the family funds but she has failed to establish this fact. As already remarked it is not denied on behalf of the plaintiff that a portion of the house was built in the time of Surjan Singh while the other portion of the house was built after Surjan's death. There is no evidence worth the name produced on behalf of the plaintiff to show that the house was ever acquired by Ludar-Chand personally. The evidence produced on behalf of defendants is very strong and proves beyond doubt that the house is the joint family property. We further wish to observe that Ludar Chand had been

appointed a *mukhtar* by Surjan Singh in his life time. It appears to us that many of the deeds which Surjan executed were executed by Ludar Chand as *mukhtar* of his father. We might make a reference to the evidence of Beli Ram witness of the plaintiff who says that the income of Surjan was Rs. 500 or Rs. 600 a year. That also goes to show that there was a nucleus with the help of which other property could have been acquired. We think that the learned Subordinate Judge is right when he remarked in his judgment :—

> "This cannot be denied that the family nucleus was sufficient in the common family fund to raise a presumption that the house could have been built out of that fund".

It was argued on behalf of the plaintiff in the Court below and the same argument was addressed to us that it was strange that Jodh Singh and Amar Singh were not made parties to the suit. This was a mistake on the part of the plaintiff and surely she cannot be allowed to take advantage of her mistake. Of, course, it was open to these two sons of Ludar Chand to ask that they should be made parties but as they were not sued it was open to them to ignore the case altogether. Before the Court below it was urged that Ludar Chand had described the house as his self-acquired property. That does not mean anything. This is merely a statement of Ludar-Chand who was one of the members of the joint family. Other members of the joint family can insist that the fact should be proved. Before the Court below a point was taken in argument that as Ludar Chand was in possession of the house for many years so there was a presumption that it was his self acquired property. We most emphatically disagree with this view. The plaintiff had, in the first instance, to prove that Ludar Chand was not a member of the joint family. There can be no presumption that the house was his self-acquired property simply because he was in possession of it for several years. The plaintiff produced a register of the Zamindara Bank in which there was an entry that in 1978 Ludar Chand owned three houses but the learned Subordinate Judge has rightly held that it does not

prove that the house in question was included in these houses. A futile attempt was made by learned counsel for the appellant in trying to show to us that the house in suit was acquired by Ludar Chand alone but he has been unable to successfully convince us. It appears to us that the entries in the Zamindara Bank Register of 1978-79 do not go to establish the fact that the house belonged to Ludar Chand alone. On the other hand it strongly supports the case of the defendants. It was shown to us that a pre-emption suit which Ludar Chand had filed and in which he had obtained a decree was a point in favour of the plaintiff. We think that it is nothing of the kind. All that the facts prove is that Ludar Chand acting as a *mukhtar* of his father instituted a pre-emption suit and obtained a decree but any decree which a *mukhtar* of Surjan might have obtained would be for the benefit of the entire joint family. It can not be said that it is a point in favour of the plaintiff. The learned Subordinate Judge, after a consideration of the entire evidence, oral and documentary, which was produced in the case, has come to the conclusion that the defendants have been able to show that there was a nucleus with the help of which the joint family could have acquired the property. In the present case it is proved that the property was the joint family property. The house was a *kacha* one and was built by Surjan. Ludar Chand might have spent money later on but the presumption is that the house continued to be joint family property. Of course, that presumption could be rebutted by the plaintiff. We may also point out that certain property was taken by Ludar Chand as mortgagee. The learned Subordinate Judge in his judgment says that it was house proporty but this is admittedly inaccurate. It was a piece of land which had been mortgaged to him. It has been said on behalf of the plaintiff that this land had been sub-mortgaged to somebody else by Ludar Chand. We know absolutely nothing as to where this land is and who is in possession of it. If it was land mortgaged to Ludar Chand the plaintiff could have very easily proved it by producing the mortgage-deed and other witnesses who would depose that Ludar Chand was the exclusive owner of the money which was advanced and then it could have been proved that later on Ludar Chand alone sub-morgaged the land. The

record shows nothing. As some of the plaintiff's own witnesses have said that the property in suit is the joint family property the irresistible conclusion is that a finding should go in favour of defendants. We are of opinion that the view taken by the learned Subordinate Judge of the evidence on the question as to whether the property was joint or not is correct. In our opinion the property is proved, beyond any doubt, to be joint and the evidence which has been produced by the plaintiff to prove to the contrary is not worthy of credit.

For the above reasons we dismiss the appeal with costs.

Revisional Criminal.

1998 *Magh 18* *Before Chief Justice (R. B. Thakar Rachhpal Singh).*

AMAR NATH AND OTHERS *Versus* STATE.

CRIMINAL REVISION NO. 13 OF 1998.

Criminal Procedure Code—Section 108—witnesses.

Accused summoning responsible officers to prove things which could be easily proved otherwise—duty of Magistrate.

The application of the accused for summoning the Ministers and other high responsible officers in order to prove things which could be easily proved otherwise (e. g., colour of the State flag and the age of certain officers) was clearly one made for the purpose of vexation or delay or for defeating the ends of justice, and the Magistrate was justified in refusing to summon them.

Members of the bar signing such applications—their responsibility explained.

Members of the Bar are officers of the Court and they should not in their own interest sign applications which bring them into ridicule. They must remember their responsibility which they owe to the Court and,

therefore, they have to be careful. They should not on any account sign applications of this type.

Criminal Procedure Code—Section 257.

The Courts should give every facility to the accused persons proceeded against in a criminal case to prove their defence in a regular and fair manner and must issue process for attendance of their witnesses. But this right of accused is subject to the limitation laid down in Section 257 Criminal Procedure Code. Magistrates, before they summon witnesses, should see that the application is bonafide and should refuse the request for summoning witnesses if they find that the application is made for the purpose of vexation or delay or for defeating the ends of justice. When a Magistrate refuses to issue process he should record his grounds in writing. A. I. R. 1932 Allahabad 125, A. I. R. 1921 Allahabad 142 followed.

General Criminal Rules—Chapter XXI—Expenses of witnesses compelled by Magistrates to attend the Court—by whom to be paid.

According to clause (4) of Rule I Chapter XXI of the General Criminal Rules, criminal Courts are authorised to pay the expenses of complainants and witnesses in all cases in which they are compelled by the Magistrate to attend the Court, whether they may be prosecution witnesses or defence witnesses.

A. I. R. 1922 Lahore 71, A. I. R. 1937 Lahore 458, A. I. R. 1929 Lahore 23 followed. A. I. R. 1932 Lahore 481, A. I. R. 1924 Patna 142 held not applicable.

REVISION FROM THE ORDER OF L. HAVELI RAM SESSIONS JUDGE, JAMMU.

MESSRS. NUR HUSSAIN AND YASH PAL VAKILS—For the applicants.

ADVOCATE GENERAL—For the State.

Action under section 108 of the Criminal Procedure Code was taken against the applicants who

have come up in revision before this Court. The applicants were tried before the trial Court and after the evidence of the prosecution had been finished the applicants were called upon to produce their witnesses. The applicants then produced a list before the Court of their witnesses. The learned Magistrate refused to summon the witnesses for the defence. The applicants were not satisfied with the order of the Magistrate and went in revision before the learned Sessions Judge. He upheld the order of the Magistrate and then the applicants have come in revision to this Court.

It appears that there are three cases under section 108 of the Code of Criminal Procedure pending against the four applicants. The judgment of the learned Sessions Judge shows that at first a list was given showing that the defence wanted to examine 127 witnesses in all. Later on a curtailed list was produced showing the number to be 87. The learned Magistrate refused to summon some of the witnesses because he thought that the application for summoning them was made for vexation or delay or for defeating the ends of justice. This is the one of the points for consideration. It appears that the case has been handled very carefully by the learned Magistrate and by the learned Sessions Judge. The order of the learned Sessions Judge is very proper. I take the following quotation from the learned Sessions Judge's judgment :—

"I questioned the learned counsel and asked him to satisfy me how the evidence of these witnesses was necessary for defence. He failed to satisfy me on this point. The case for prosecution is that the applicants made certain speeches the subject matter of which brings them within the mischief of S. 108 Cr. P. C. There are only two points in issue; whether the speeches were made as reported and whether they are of the nature described in the said section. The learned Magistrate has not refused to summon any witness who is alleged to have been present in the meeting. The second question is of law. The applicants applied to summon witnesses occupying high official ranks for the purpose of asking these witnesses what their ages were. This fact can

be easily proved without summoning them. Some witnesses have been summoned to prove that there have been complaints of bribery in the various departments of the State and that an anti-corruption Committee was also set up by the Government. The application included some witnesses who were expected to depose to the previous record of some police officers who reported the speeches or were concerned in the investigation of the case. The learned counsel has fai'd to satisfy me that in a single case the learned Magistrate has exercised his discretion improperly or unfairly. The learned Magistrate has offered to summon witnesses if their expenses are deposited in Court. I think in the circumstances of this case this order is also justified. He should have fixed the expenses."

The first question for consideration in this case is whether the action of the applicants in summoning large number of witnesses was justified and on that question I have absolutely no hesitation in holding that the action of the applicants was wholly unjustified and that they wanted to play with the Court. I wish to make a mention of this fact here that in order to prove their case the applicants summoned the following witnesses :—

All the Ministers

Chief Justice

Members and President of Anti-corruption Committee.

President and Secretary of the Praja Sabha.

Governor Jammu and his Superintendent.

Inspector General of Police with his P. A.

Accountant General, his officc Superintendent and Chief Auditor.

Chief Secretary.

Deputy Chief Secretary.

Personal Assistant Secretary to Prime Minister.

Law Secretary.

Home Secretary.

Revenue Secretary.

Hazur Secretary.

Development Secretary.

Senior Superintendent Police Srinagar.
Senior Superintendent Police Jammu.
Senior Superintendent C.I.D.
} With their recordkeepers

Chief Engineer P. W. D. with office Superintendent.

Chief Engineer Electrical and Mechanical with office superintendent.

Superintendent of Irrigation Department.

Chief Engineer Irrigation.

Chief Conservator of Forests and his Superintendent.

Director of Industries
Director of Education
Director of Medical Services.
Director of Sericulture.
} with office Superintendents.

Inspector General of Customs and Excise with Superintendent.

Secretary Text Book Committee.

Managers Silk Factories Srinagar and Jammu.

Principals of Colleges at Jammu and Srinagar with their Head Clerks.

No. 62 to 73.—Head Masters of various High Schools.

Revenue Commissioner.

Sessions Judges of Jammu and Srinagar (L. Mul Raj and L. Haveli Ram.)

Registrar of the High Court.

Pandit Prem Nath (Secretary Amar Singh Club) with accountant of the club

Dealers in liquor (Rija Singh and Gulsaran Dass).

87—100.—Editors of all Newspapers with their papers including articles about corruption.

Certain members of the Congress Committee outside the State and so on.

I have never heard of a case in which any man has taken into his head to summon all responsible officers connected with the Government in order to prove things which can be very easily proved.

It appears to me that the applicants have absolutely no sense of responsibility. One of the points which the applicants wanted to prove was the colour of the flag of the State. I asked learned counsel for the applicants why the Governor of the Province was summoned and I was informed that the Governor was summoned to prove the colour of the flag. This shows that the applicants were simply playing with the Court. There could be no necessity for producing a Governor to prove the colour of the flag. If it was necessary for the applicants to prove the colour of the flag they could have asked the Court to get a flag or could have produced a flag

themselves to show what its colour was. If the prosecution witnesses did not mention the colour of the flag then it was utterly wrong on their part. Any man can mention the colour of the flag of the State. The action of the accused cannot be too strongly condemned when they insisted that a large number of witnesses should be produced to prove their ages. In the first place the history of the services of the gazetted officers are given in the Civil List. Suppose for a moment to meet the argument that the history of the gazetted officers did not disclose their age then it was very easy for the applicants to put in a witness who could say what their ages were. There was no necessity to summon the Prime Minister or any other minister to prove their ages. The applicants could have told the Court that they wanted to prove the ages of the ministers and of other officers and that information should be given to them. It appears that applicants were simply playing with the Court and I find that the action of the Magistrate in not summoning any of the witnesses of the applicants except those who have been summoned was quite just and proper. The action of the applicants in playing these tricks on the Court cannot be too strongly condemned. It is a matter of great regret to me when I find that the application for summoning witnesses is signed by two members of the Bar. It must be remembered that members of the Bar are officers of the Court and they should not, in their own interest, sign applications which bring them into ridicule. They must remember their responsibility which they owe to the Court and therefore they have to be careful. If a man does not know better I can expect him to make all sort of frivolous and foolish applications but I expect that the members of the Bar should be very careful. They should not on any account sign applications of this type. Section 257 of the Code of Criminal Procedure lays down as follows :—

> "If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witnesses for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such

> process *unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such grounds shall be recorded by him in writing.*"

It appears to me that in the present case the courts below refused to summon witnesses because it was found by the learned Sessions Judge and by the Magistrate that the application should be refused because it was made for the purpose of vexation or delay or for defeating the ends of justice. No one can sympathise with the applicants in the present case. If the idea of the applicants had been to fight the case fairly my sympathies would go with them. I would give them every facility to prove their defence in a regular and fair manner but when they have taken into their head to summon witnesses foolishly or witnesses who prove nothing pertinent to the case then I have absolutely no sympathy with them. The applicants, or an accused in a criminal case, generally can say that opportunity should be given to them to rebut the case for the prosecution. Such a request is quite reasonable and the Court should give every facility to them to meet the case for the prosecution. But if the Court finds that the accused or the applicants are bent upon acting foolishly or adopt a course which no reasonable man will adopt, it is the duty of the Court to put them down very firmly. Magistrate should not let the accused or applicants think that they can take advantage of the leniency of the Magistrate and give them all sort of trouble. Magistrates have to be firm. Learned Advocate General has very ably argued the case before me and on a consideration of the arguments I have no hesitation in holding that the order of the Court below which is complained against was quite fit and proper.

I wish to say a few words on the legal aspect of the matter which is before me, because the matters of this type sometime come before Courts, though I must confess that generally speaking it is in very few cases that such unreasonable attitude is taken by the applicants. Section 257 I have already quoted. It must be made clear to the Court below that if any

accused makes an application for summoning witnesses in order to play with the Courts then such an application should be refused. Magistrates, before they summon witnesses, should see that the application is *bonafide*. Magistrates should refuse the request for summoning witnesses if they find that the applicant has made the application for the purpose of vexation or delay or for defeating the ends of justice. He shall write down his grounds on the record. In connection with this I wish to cite with great respect the observations of my late brother Sulaiman J. which are reported in 1932 Allahabad 125 :—

> "The accused had summoned no less than 183 witnesses. I would not say that a Court is not entitled to infer from the mere fact that an unduly large number of witnesses have been summoned, that the application has been made for the purpose of vexation or delay or for defeating the ends of Justice. But when the Magistrate does not consider that the application has been made for such a purpose, he has no option but to issue process under section 257 (1) Criminal Procedure Code. The section is imperative and compels the Magistrate to issue such process, except in the case mentioned above. Where he refuses process he is directed to record his grounds in writing."

According to law in British India the Magistrate has to summon witnesses if the accused wished to produce any defence unless, of course, Magistrate can bring the case within section 257 of the Code of Criminal Procedure. The law on the subject is very clearly explained in a ruling passed by Sir Benjamin Lindsay in a case reported in A. I. R. 1921 Allahabad 142. The learned judge says that it is the business of the Court to see that its summonses and warrants are duly executed, and if the accused insists on the Court issuing process for the attendance of the witnesses he will have done all that the law requires of him. If the summonses and warrants are not executed, the accused cannot be held responsible If I may say so with great respect, I entirely agree with the view ex-

pressed in this case. Ordinarily an accused or a person who is proceeded against in a criminal case, has a right to examine defence whether he is in jail or on bail. But there is that limitation under section 257 of the Code of Criminal Procedure which has to be faced. If the Magistrate finds that the attitude of the accused is vexatious and he is summoning large number of witnesses or even a few witnesses then his application should be refused without the slightest hesitation. Take the instance of a man who is prosecuted under section 353 of the Ranbir Penal Code. He takes into his head to insist that he would summon witnesses from China. The Court will take into consideration the propriety of the application; whether a witness may be summoned from China or application may be refused. The Magistrate has to see that the application is vexatious or proper. If the application is proper it does not matter if the witness is at China but if the application is vexatious the Magistrate has every right to refuse it. A reference may be made to a ruling of Bennet C. J. and Verma J. reported in A. I. R. 1939 Allahabad 101. The head note says that where the number of witnesses is large and they come from many parts of the country, their expenses would not be at all a reasonable charge on Government. Therefore the Magistrate is perfectly entitled to hold that these expenses cannot be reasonably incurred by Government under section 544, and he is therefore correct in requiring that the expenses should be deposited by the accused prior to the issue of summons in accordance with section 257 (2).

This may be the law in Allahabad side but in order to understand the correct position in the State we have to be guided by the rules made by the State. Now I proceed to consider what the State law on the subject is. Instructions on the point are contained in Criminal Rules, Chapter XXI. According to clause (4) of Rule 1, criminal Courts are authorised to pay the expenses of complainants or witnesses in all cases in which they are compelled by the Magistrate, to attend the Court. They may be prosecution witnesses or defence witnesses. If a witness is ordered to attend the Court by a Magistrate then he is entitled to expenses having regard to the provisions of this

rule. Learned counsel for the applicants referred me to a ruling of the Punjab High Court reported in A. I. R. 1922 Lahore 71. It has been held in that case that section 257 leaves to a Magistrate no discretion to refuse to issue a process to compel the attendance of a witness unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. I agree with this view and I think the ruling is helpful to the prosecution in the present case. The learned Magistrate has found that the application was made for the purpose of vexation. Another ruling cited by the learned counsel for the applicant was of Abdul Rashid J. reported in A. I. R. 1937 Lahore 458. The learned Judge remarked that in warrant cases the cost of causing the attendance of the defence witnesses is to be borne by the Crown, and without assigning adequate reasons a departure from this rule is not permissible. I agree. But the case here is altogether different. The question is whether the application is vexatious or not. It has been found that the application is vexatious and it cannot be granted. Another case cited on behalf of the applicants was Ram Narain Sharma *versus* Emperor reported in A. I. R. 1932 Lahore 481. That was not a case in which it was held that the action of the accused was vexatious, and the ruling, therefore, has no application. Another case cited by learned counsel is Debi Singh and others *versus* Emperor reported in 1924 Patna 142. This is a ruling by Macpherson J. It appears that section 257 was not before the learned Judge. This ruling has no application. A ruling of the late Chief Justice of the Lahore High Court has been cited before me and it is reported as Sayad Habib *vsreus* Emperor, A. I. R. 1929 Lahore 23. It was held in that case that "the ordinary procedure in warrant cases is that the costs of causing the attendance of the accused's necessary witnesses is usually borne by the Government. The Magistrate has no doubt authority to depart from this usual practice but there should be strong and cogent reasons for making the departure. Where the Magistrate finds that the accused has given a long list of witnesses to defeat or delay the ends of justice, he may decline to compel their attendance, under sub-section (1) but at the same time he must be careful not to do any act which might hamper the

accused in his defence. The Court should, in a case of this type, adopt a reasonable course which would, while avoiding any hardship on either side, promote the ends of justice."

I respectfully agree with the view expressed by Sir Shadi Lal in this ruling. When there is criminal case pending before a Magistrate he should see that the accused is not hampered and he should give him every opportunity to prove his defence in a reasonable manner. It is different altogether where a Magistrate finds that the accused is unreasonable. Then the Magistrate can take action under section 257 of the Criminal Procedure Code. I entirely agree with the view taken by the learned Sessions Judge in this case and dismiss the revision application.

Appellate Criminal.

Before Mr. Justice Haveli Ram.

1998
Chet 26,

HABIB HAJAM—(NON-APPLICANT)—APPELLANT.

versus

STATE.

CRIMINAL 1ST APPEAL NO. 18 OF 1998.

Criminal Procedure Code (Act XXIII of 1989)—Sections 123 and 406—Appeal from order requiring security for good behaviour—Period exceeding one year in case of some persons and not exceeding one year in case of others—Cases of all should be referred to Sessions Judge—No appeal lies to High Court.

Sub-section (3-a) of Section 123 provides that if security is required from some persons for a period exceeding one year and their cases are referred to the Sessions Judge, under sub-Section 2, such reference shall also include the cases of persons from whom security has been required for less than one year in the same proceedings.

No appeal lies to the High Court from the order of

the Sessions Judge confirming the order of security on a reference under Section 123.

APPEAL FROM THE ORDER OF LALA MUL RAJ MENGI, SESSIONS JUDGE, SRINAGAR, DATED 4TH MAGHAR 1998.

NEMO—For the Appellant.
ASSISTANT ADVOCATE GENERAL—For the State.

The following nine persons were ordered to furnish security for good behaviour under sections 110/118, Criminal Procedure Code by the Subordinate Judge, Magistrate first class, Baramulla:—

1. Habib in the sum of Rs. 500 for three years.

2. Ismail in the sum of Rs. 300 for three years.

3. Jamal in the sum of Rs. 300 for two years.

4. Asad in the sum of Rs. 300 for two years.

5. Ramzan Hajee in the sum of Rs. 100 for one year.

6. Rehman Bat in the sum of Rs. 100 for one year.

7. Ahad Dar in the sum of Rs. 100 for one year.

8. Moh'd Wain in the sum of Rs. 100 for one year.

9. Samad Bat in the sum of Rs. 100 for one year.

The securities furnished by Nos. 1, 2, 4, 6 and 8 were rejected by the learned Magistrate. No. 9 furnished security and did not appeal. The cases of Nos. 1, 2, and 4 alone were referred to the Sessions Judge, Kashmir, under section 123(2) of the Criminal Procedure Code by the learned Magistrate. Nos. 5, 6 and 8 preferred a joint appeal and No. 7 a sepa-

rate appeal to the Sessions Judge.

The learned Sessions Judge confirmed the order of security against Nos. 1, 2 and 3 but reduced the period of security to one year in each case. The order against No. 4 was set aside and he was discharged. The appeals of Nos. 5, 6, 7 and 8 were accepted and they were discharged. Habib Hajam No. 1 has now come up in appeal against the order of the learned Sessions Judge Kashmir. He is unrepresented before me but the learned Assistant Advocate General has taken me through the evidence on the record.

I think no appeal lies in this case. The only section under which an appeal lies in security proceedings is section 406 of the Criminal Procedure Code but that section governs the case of a person who has been ordered to give security by a Magistrate. It has been expressly provided in the 2nd proviso that nothing contained in section 406 shall apply to persons proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section 2 or sub-section 3(b) of section 123.

There is a clerical error in the order of the learned Sessions Judge. The amount of security in the case of the appellant fixed by the learned Magistrate was Rs. 500 but the learned Sessions Judge, in his judgment, has stated it to have been Rs. 300. However, the order of the learned Sessions Judge may be taken to have reduced the amount of security from Rs. 500 to Rs. 300. It is necessary to point out that such errors should not be allowed to creep into judicial pronouncements which should be drawn up very carefully.

There is another error in the order of the learned Sessions Judge. He entertained appeals from certain persons from whom security had been demanded by the learned Magistrate in the same order after joint enquiry. On this point, the provision of section 123 sub-section 3(a) is perfectly clear. That sub-section lays down that if security has been required in the course of the same proceedings from two or more persons, in respect of any one of whom the

proceedings are referred to the Sessions Judge, under sub-section 2, such reference shall also include the case of any other of such persons who has been ordered to give security. It is perfectly clear that if one of the persons concerned in the same proceedings has been ordered to give security for a period exceeding one year and other persons have been ordered to give security for a period not exceeding one year, the cases of all such persons are to be referred to the Sessions Judge under section 123 and no appeal lies to the Sessions Judge in the case of any such person. The learned Sessions Judge of Kashmir was not, therefore, justified in entertaining appeals from these persons in this case from whom security had been demanded for a period not exceeding one year. The learned Magistrate should have referred the cases of all these persons to the Sessions Judge and the latter should have dealt with all of them under section 123.

The position, therefore, is that the order for security demanded from Habib Hajam must be deemed to have been passed by the Sessions Judge and not by the Magistrate and as section 406 gives the right of appeal only when the security has been ordered by a Magistrate, no appeal lies in the present case.

Considering that the appellant was unrepresented before me, I have gone into the evidence and considered whether there is any justification for interfering in revision on behalf of Habib Hajam. I find that there is a mass of overwhelming evidence against him. As many as seventeen witnesses whom the learned Magistrate and the learned Sessions Judge have believed, have deposed to specific acts which fall within the several clauses of section 110 and on the face of this overwhelming material I am convinced that the order of security was justified on the merits.

The appeal in these circumstances is hereby dismissed.

Appellate Civil.

1998
Phagan 28,

Before Mr. Justice Masud Hasan and Mr. Justice Haveli Ram.

BHAGAT RAM—(JUDGMENT-DEBTOR)—APPELLANT.
versus
TOTA RAM AND OTHERS—(DECREE-HOLDERS)—RESPONDENTS.

CIVIL 2ND APPEAL NO. 68 OF 1996.

Civil Procedure Code (Act X of 1977)—O-41, R. 33—Power of Court of appeal.

Two persons M and A brought a suit for recovery of certain money against defendants. This suit was dismissed but on appeal the Additional District Judge passed a decree in favour of the legal representatives of M as through some misapprehension, A was not impleaded in the Court of appeal and it was represented to that Court that he was dead. Second appeal to High Court was preferred by defendants and they impleaded A also as one of the respondents. This appeal was dismissed and suit stood decreed. The operative order of the High Court was that the decree passed by the Additional District Judge in favour of the plaintiffs be upheld.

In the course of the execution proceedings of this decree objection was raised by defendants, judgment-debtors to its executability on the ground that the decree is not in conformity with the judgment because A's name has been included in the array of the decree-holders.

Held that the decree passed by the High Court is not a nullity and is executable. This decree is open to no defect. Obviously the decree passed by the Additional District Judge has merged into the decree of the High Court. It is one of the elementary principles of law that the executing Courts should not go behind the decree except only when the decree was passed without jurisdiction.

A. I. R. 1935 *Nagpur,* 235, *A. I. R.* 1926 *Madras* 991 ;

A. I. R. 1932 *Calcutta* 9, *A. I. R.* 1925 *Lahore* 494 ;

A. I. R. 1934 *Lahore* 117; *discussed and distinguished.*

APPEAL FROM THE ORDER OF CH. BHAGAT RAM, ADDITIONAL DISTRICT JUDGE, MIRPUR, DATED 24TH POH 1996, UPHOLDING THAT OF PANDIT MUNNA LAL SHARMA, SUB-JUDGE, KOTLI, DATED 8TH BAISAKH 1995.

MR. LOK NATH SHARMA—Advocate for Appellant.
PT. BIHARI LAL BAKHARI,—Vakil for Respondents 4 to 7.
MR. DINA NATH MAHAJAN—Advocate for Respondents 1 to 3.

Masud Hasan J.—This is a judgment-debtor's appeal arising out of an execution matter and it appears to us that by means of this appeal this Court and the executing Court below are asked to go behind the decree that was passed against the judgment-debtor. To appreciate the controversy at this stage a few facts may be narrated. Two persons, Mul Raj and Anant Ram, brought a suit for the recovery of certain moneys against Bhagat Ram, Sita Ram, Harbans Lal and Amar Nath on the basis of an acknowledgment that was executed by Amar Nath. This suit was dismissed on the 14th of Chet 1990 but on appeal the Additional District Judge passed a decree in favour of the legal representatives of Mul Raj who happened to be his grand-sons. It appears that through some misapprehension Anant Ram was not impleaded in the course of the appeal to the learned Additional District Judge and it was represented to that Court that he was dead. The learned lower appellate Court delivered judgment on the 9th of Bhadon 1993. From this judgment a second appeal was preferred by the judgment-debtors. At this stage the judgment-debtors impleaded Anant Ram also as one of the respondents although he was not a party before the Additional District Judge. The appeal was dismissed on merits. The result was that the suit stood decreed. The operative order of the High Court was that the decree passed by the District Judge in favour of the plaintiffs be upheld.

In the course of the execution proceedings of this decree objection was raised by the judgment-debtors to its executability on the ground that the decree is not in conformity with the judgment because Anant Ram's name has been included in the array of the decree-holders. Thereupon the learned Subordinate Judge of Kotli launched upon, what appears to us, to be a wholly uncalled for enquiry. He framed an issue to the effect whether the decree passed by the District Judge and later affirmed by the High Court was an executable decree and whether the District Judge had any authority to pass such a decree. In our opinion this enquiry, at this stage, was wholly uncalled for. It is one of the elementary principles of law that the executing Courts should not go behind the decree except only when the decree has been passed without jurisdiction. We do not understand the objection at that stage to have been that the decree was passed without jurisdiction. Any how the learned Subordinate Judge came to the conclusion that the decree was executable and set aside the objections made by the judgment-debtors.

In this appeal it has been argued on behalf of Bhagat Ram one of the judgment-debtors that the decree is a nullity on the ground that it purports to have been passed in favour of Anant Ram VISA VIS whom the suit was dismissed by the trial Court. It appears to us, without going further into the matter, that this is an argument which does not befit the judgment-debtor, Bhagat Ram. The facts as disclosed before us reveal that it was only through a misapprehension with regard to the death of Anant Ram that he was not made party before the lower appellate Court. He was in fact very much alive and the judgment-debtor, appellant at that stage, realising this technical defect impleaded him in the array of respondents. It, therefore, does not lie in his mouth to say that the fact of bringing the name of Anant Ram on the record should be a reason to defeat this decree. Besides we are of the opinion that the decree, as it has been passed by the High Court, is open to no defect. Obviously, the decree passed by the Additional District Judge has merged into the decree of the High Court. Learned Counsel's argument is that the decree of the High Court refers to the de-

cree of the District Judge and its reflection upon the decree-sheet is not correct. If that were so it was for the judgment-debtor to have the decree corrected; the executing Court has no power to alter the decree.

In support of the argument that the decree is a nullity a number of rulings have been produced by the learned Counsel. I may briefly deal with these rulings. The first ruling is contained in Radha Kishan Laxmi Narain V. Bhagwan Das, A. I. R., Nagpur, 235. In this case a decree was passed against certain minors and their objection at the time of the execution was that they were not properly represented at the time the decree was passed. This objection was upheld and the decree was treated as a nullity. This would show that as far as the minors were concerned, because they had been able to prove that they were not properly represented, the Court had no jurisdiction to pass a decree against them. The next ruling is Veru and another V. Thekhedath Veetil Kannamma, A. I. R., 1926, Madras, 991. In this case a decree was passed against a person who was not on the record but who was a necessary party. It was held to be not binding on him and was declared void because his interests were found to be inseparable from those who were on the record. The position of a party against whom a decree has been passed and which is not binding upon him is very much different from the position where the decree has been passed in favour of some party and the objection is taken by a third person to have it treated as a nullity because that party was not present. These rulings in my opinion are not applicable to the facts of the case before us. The next ruling is contained in A. I. R. 1932, Calcutta, 9—Rabindra Nath Chakravarthi V. Jnanendra Mohan Bhaduri & others. This was the case of an award in which the objector was successful to show that the decree was not in conformity with the award. Here again it was held that a Court has no jurisdiction to pass a decree not in conformity with an award and the objection was allowed to prevail. Two other rulings, namely A. I. R., 1925, Lahore, 494 and A. I. R. 1934, Lahore, 117 have been relied upon to support the proposition advanced on behalf of the judgment-debtor. In both these rulings the decree was admittedly passed against a dead person. Now it is

obvious that a decree against a dead person is without jurisdiction. The principle laid down in these rulings, i.e., that in certain conceivable cases where Court has no jurisdiction decrees passed by that Court are nullities and may be objected against at every stage, whether that stage happens to be the stage of execution or otherwise cannot be questioned. But that is not the question before us. It is not contended here that the Court had no jurisdiction to pass the decree. The contention is that the decree does not faithfully interpret the judgment. I am, therefore, of the opinion that these rulings are not applicable to the facts of the case before us.

The respondents other than Tota Ram, i.e., the minor sons of Amar Nath have instructed their counsel to join cause with the judgment-debtor Bhagat Ram. I find that these respondents did not make these objections before the executing Court nor filed an appeal here and I am of the opinion that their learned counsel has no *locus standi* to demand a hearing in this matter. He seeks support from the provisions of Order 41, Rule 4, Criminal Procedure Code. That provision only says that the Court is entitled to pass an order in favour of the parties before it but the question is whether the parties have a right of audience. I find that these judgment-debtors have no right of audience. The result, therefore, is that although I do not agree with the treatment meted out by the learned lower appellate Court to this case I find that the conclusion to which it has reached by this devious method is correct and should be maintained. I will, therefore, dismiss this appeal with costs.

Haveli Ram J.—I agree and would add that these contentions were raised by the learned counsel for the appellant before the High Court when the matter came up before it on the previous occasion. Having failed on that occasion I do not think the learned counsel can reagitate the same question now. The learned counsel for the appellant has argued that although in the decree passed by the learned District Judge as well as in that passed by the High Court the word "plaintiffs" is used, yet the word "plaintiffs" as used therein excludes Anant Ram. This

may be plausible so far as the decree passed by the District Judge is concerned, because he was under the impression that Anant Ram was dead. But even he by referring to the minor sons of Anant Ram in his judgment has indicated that he did not intend to exclude Anant Ram from the benefit of the decree. It is, therefore, clear that the term "plaintiffs" as used in both the decrees was not intended to exclude Anant Ram.

Revisional Civil.

1998 *Before Mr. Justice Masud Hasan.*

Phagan 22.

LADHOO—(PLAINTIFF)—APPLICANT.

versus

ABDULLA AND OTHERS—(DEFENDANTS)—NON-APPLICANTS.

CIVIL REVISION NO. 15 OF 1998.

Contract Act (IX of 1977)—Section 68—claim for necessaries supplied to minors—what are not necessaries.

Section 68 contemplates supply of necessaries suited to minors' condition in life. This would naturally mean that remote circumstances like the indebtedness of the father or the actions of the mother not directly connected with the supply of necessaries to the minors could not be used to prove that the money was spent for the benefit of the minors.

REVISION FROM THE ORDER OF TH. SHIV RAM, SUBORDINATE JUDGE, JAMMU, DATED 28TH SAWAN 1998 REVERSING THAT OF KHAN MOHAMAD MUZAFFAR KHAN, MUNSIFF, RANBIRSINGHPURA DATED 27TH SAWAN 1997.

MR. AMAR CHAND VAID—Vakil for Applicant.
MR. RAM LAL ANAND—Advocate for Non-applicants.

This case had rather a chequered career and in the circumstances disclosed I feel that it should not have been shuttle-cocked from one Court to another

before arriving at a judgment. The suit was quite a simple one for the recovery of a sum of Rs. 300 on the basis of a bond dated 24th Maghar 1989. It appears that on that date there was renewal of an earlier bond dated 28th Katik 1985 which was executed by one Mst. Rajan for Rs. 200 in her capacity as guardian of two minor boys namely Abdulla and Ali Ahmed in favour of Ladhoo the present plaintiff and one Chetu the husband of the defendant Mst. Barkati. Mst. Barkati has been made defendant because Chetu is dead and Chetu had sold his share to Ladhoo.

Mst. Rajan is dead and of the minors on whose behalf this bond was alleged to have been executed, Abdulla has become a major and other Ali Ahmed is still a minor. These two defendants, i.e., Abdulla and Ali Ahmed pleaded in their defence that they had no knowledge of the circumstances in which this bond was executed. They further pleaded that in any case Mst. Rajan had no authority in law to enter into any transaction of the kind. In a separate written statement Mst. Barkati admitted the claim advanced by the plaintiff. It appears that the defendants Abdulla and Ali Ahmed also pleaded that some land belonging to them had come into the possession of the plaintiff and that the plaintiff should be taken to have reimbursed himself for any monies which may be found due to him. The learned Munsiff who tried this suit recorded a finding that the execution of this bond was proved and also the payment of Rs. 200 to Mst. Rajan but he held that Mst. Rajan had no authority to enter into this transaction and that the contract was void. He, thereupon, dismissed the suit. Being a suit under the Agriculturists' Relief Act a revision was preferred straight to the High Court which remanded the suit for fresh enquiry on the ground that mere finding that Mst. Rajan had no authority to execute was not sufficient and that it was necessary for the trial Court to find out, presumably under section 68 of the Contract Act, that the money that was borrowed by Mst. Rajan was not spent on the necessaries of the minors. On that remand the learned Munsiff recorded the finding that the money was spent for the benefit of the minors and decreed the suit. An appeal was lodged before

the learned City Judge who again felt the necessity of remanding this suit ostensibly on the plea that the defence taken on behalf of the defendants Abdulla and Ali Ahmed with regard to the possession of their land by the plaintiff was not adverted to. This demand was under Order 41, Rule 25. The Munsiff submitted a report which was categorically rejected bythe learned lower Court as a report of practically no consequence. At this stage the lower appellate Court itself went into the case and upset the finding of the learned Munsiff with regard to the finding that the money was spent on the necessaries of the minors and dismissed the suit.

This is, therefore, the plaintiff's application in revision and it has been strenuously argued on his behalf that the findings recorded by the learned lower appellate Court are not correct. It is contended in the first instance that it was not necessary for the plaintiff in a suit of this nature to prove the manner in which every item of money borrowed was spent and all that was necessary to prove was that at the time this money was borrowed the minors had no assets sufficient to support them and that this money was primarily spent in providing necessaries of life to them.

I find that the legal position is very correctly stated by the learned counsel on behalf of the applicant. There is, however, no proof in support of the legal proposition as stated. The evidence in the case confines itself only to (a) that Mst. Rajan borrowed subsequent to this transaction a sum of Rs. 41 from the Co-operative Bank and (b) that to the same Bank the husband of Mst. Rajan, i.e., the father of the minors stood indebted to the sum of Rs. 270. From these two circumstances it is sought to compose the inference that it must be presumed that the minors had no assets and that the money should have been spent upon their necessaries. In all conscience this is too large a presumption to be drawn from these circumstances. Section 68 contemplates supply of "necessaries suited to his (minors) conditions in life". This would naturally mean that remote circumstances like the indebtedness of the father or the actions of the mother not directly connected

with the supply of necessaries to the minors could not be used to prove that the money was spent for the benefit of the minors. It was only to be expected in a suit like this that the plaintiff would be careful to prove that he had made enquiries that the minors stood in need of certain necessaries at the time the money was borrowed and that immediately after that these needs were complied with. I am of the opinion that although the Court has not said so in so many words that is the lacuna in the case. Whatever oral evidence has been led on behalf of the plaintiff has been disbelieved and the Court has refused to draw from the two circumstances narrated above the inference which it was asked to draw.

It is next argued that if a decree could not be passed against the minors in this case then as far as Mst. Barkati is concerned a decree to the extent of Rs. 100 should have been passed against her because she had confessed judgment. Here again there seems, to my mind, a little confusion. It was not for Mst. Barkati to admit the legality of the original contract. She only admitted the fact of such transfer which was made by her husband Chetu to Ladhoo. If the initial transaction of the contract between Ladhoo and Chetu on one side and Mst. Rajan on the other failed them obviously the transfer of a moity, *interse*, would not charge one or the other with any liability arising out of that contract. These two grounds, therefore, in my opinion fail.

It is lastly argued on behalf of the plaintiff that at least so far has been proved that the plaintiff had advanced Rs. 200 to Mst. Rajan and that having been deprived of that money concessions should be shown to him with regard to the payment of costs. I am not disposed to interfere with the order of the lower appellate Court with regard to costs in that Court but I would like to stretch a point in favour of the plaintiff and would direct that the costs of this proceeding may be borne by the parties.

Appellate Civil.

1998
Chet 26,

Before officiating Chief Justice (Mr. Janki Nath Wazir)
and
Mr. Justice Masud Hasan.

RAM SARAN DHANI RAM—(DEFENDANTS)—APPELLANTS.

versus

SARAN SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

CIVIL SECOND APPEAL NO. 176 OF 1998.

(1) *Transfer of Property Act (XLII of 1977)—Section 123—registered deed of gift—not specifically denied by executant—proof—Evidence Act (XIII of 1977)—Section 68—Whether delivery of possession necessary for validity.*

Held that having regard to the proviso to Section 68 of the Evidence Act in case of registered instruments which are not specifically denied by the executants, the calling of a witness to prove attestation is not necessary.

Held further that the rule of Hindu Law that delivery of possession should accompany the gift to make it valid has now been diluted by the provisions of Section 123 of the Transfer of Property Act and is to this extent abrogated that where a document of gift is a registered document, delivery of possession is not necessary.

(2) *Hindu Law—Joint family—Partition—Definition of shares in revenue papers—presumption.*

Held that definition of shares in revenue papers is a circumstance which would go to support the presumption that there has been a partition of a joint family. A. I. R. 1940 Oudh 96 referred to.

SECOND APPEAL FROM THE DECISION OF LALA HAVELI RAM, DISTRICT JUDGE, JAMMU, DATED 24TH HAR, 1998, UPHOLDING THAT OF LALA BARKAT RAI, SUBORDINATE JUDGE, UDHAMPUR, DATED 22ND MAGH 1997.

MR. ROOP CHAND NANDA—*Vakil for Appellants.*
MR. PINDI DAS GOSWAMI—*Advocate for Respondents.*

———

Per Offg. C. J.—This is the defendants' second appeal arising out of a suit for the possession of certain property which was the subject matter of a gift. One Chetu, who was a co-sharer in khewat No. 18 consisting of 880 Kanals of land, made a gift of his share which was stated to be one-fourth in the khewat to Saran Singh plaintiff on the 8th Phagon 1991. Chetu died. The allegation in the plaint is that the property was jointly held by the co-sharers and that possession was not delivered to the donee, hence this suit. Ram Saran and Dhani Ram representing themselves to be the collaterals of Chetu contested the suit and pleaded in the first instance that no gift was made and secondly that Chetu had no right to make a gift of the property. It was also pleaded that Chetu had no right left in the land and that the defendants have perfected their title by adverse possession. Munshi son of Hamira was also made a party but he did not contest the suit and we are informed that he has been adopted in another family.

The Courts below recorded unanimous findings upon the issues that were raised by the pleadings of the parties. It was held that the gift was a valid gift, Chetu had a right in the property; no adverse possession was proved; and the suit was eventually decreed.

It has been argued on behalf of the defendants before us that the gift is invalid because it was of joint property and it should not be enforced because Chetu was not in possession of this property and delivery did not take place. Side by side with this argument stress is laid upon a technical contention that the deed of gift is invalid because it offends against the provisions of S. 123 of the Transfer of Property Act in as much as due attestation has not been proved.

The gift deed is a registered one and in proof of that deed the plaintiffs produced the scribe who

deposed that it was signed by the executant in his presence. Learned counsel's argument is that it was necessary to produce evidence of attestation. It is argued that attestation has the same meaning as in S. 59 of the Transfer of Property Act with regard to mortgages wherein the evidence of at least one attesting witness is essential. In advancing this argument, the provisions of S. 68 of the Evidence Act were lost sight of. The proviso to that section lays down that where an instrument is registered, production of an attesting witness in proof of execution shall not be necessary. On this point a fine difference is sought to be drawn by the learned counsel that the production of witnesses is different from the proof of attestation. A witness is obviously produced to prove something and if it is provided that in certain circumstances the production of that witness is not necessary it can only mean that what the witness would have proved will be presumed to have been proved without his doing so. There is authority for this view. In Mst. Aziz-un-Nissa V. Siraj Husain and others—A. I. R. 1934, Allahabad 507, the parties had agreed "that all registered documents should be admitted in evidence without proof of *tahrir wa takmil*". Their Lordships were of the opinion that in view of the clear agreement between the parties it was not necessary to call any attesting witness. It appears that in that case their Lordships' attention was not drawn to the proviso to S. 68 of the Evidence Act which was added by S. 2 of the Indian Evidence (Amendment) Act, 1926 (31 of 1926). In our judgment, having regard to the proviso to S. 68 of the Evidence Act in case of registered instruments which are not specifically denied by the executants the calling of a witness to prove attestation is not necessary.

It is true that it has not been definitely pleaded in this case that there has been any partition of this property but we have it on the record that between Chetu and Hamira on one side and Ram Saran and Dhani Ram defendants on the other, there has been a disruption of the joint family in the first instance and that these people have been living separately. We further find from the Jamabandi of the year 1993-94 which is on the record that the shares of the

branch of Chetu and Hamira on one side and that of Ram Saran and Dhani Ram on the other, have been entered as defined shares and the property is not entered as joint property. The lower Courts have taken these two circumstances into consideration and have held that they afforded sufficient indication of the fact that there has been, either by arrangement *interse* or otherwise, a disruption of the joint property. This proposition is supported by various rulings and reference may with advantage be made to 1940 Oudh 96 where it has been laid down that definition of shares in revenue papers is a circumstance which would go to support the presumption that there has been a partition of a joint family. It was open to the defendants to prove affirmatively that there has been no disruption of the family and therefore the gift is invalid but we find that no evidence whatever has been led on behalf of the defendants to that effect and we are therefore relegated to such material which is on the record and which is only in the shape of revenue entries, and the circumstances that one of the co-sharers Hamira sold a portion of the property holding it out as his exclusive share. We might at once concede that the proof is slender with regard to this presumption but in the absence of anything to the contrary the unanimous finding recorded by the Courts below in this behalf must be upheld.

It is lastly argued that the gift must fail because it has not been accompanied by delivery of possession. It is true that the pure Hindu Law would require that delivery of possession should accompany the gift to make it valid but as has been pointed out on behalf of the plaintiffs respondents, this rule of Hindu Law has now been diluted by the provisions of S. 123 of the Transfer of Property Act and is to this extent abrogated that where a document of gift is a registered document, delivery of possession is not necessary. This provision also is now incorporated in the text books on Hindu Law (See S. 358 of Mulla's Hindu Law 9th Edition, 1940). The result is that the three grounds of attack adopted by the defendants to defeat the plaintiffs' suit fail. The suit therefore must stand decreed.

This appeal is dismissed with costs.

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1-3-99—501.